IN RE MOHAMED AZAHARI MATIASIN (APPLICANT)

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[APPLICATION NO: K17-29-2010]
26 OCTOBER 2010

LEGAL PROFESSION: *Practice of law - Right of audience - Arbitration proceedings conducted in Sabah - Whether advocate and solicitor from West Malaysia could appear as co-counsel -Whether must first apply for ad-hoc admission to Sabah Bar - Test for determining whether ad-hoc admission should be granted - Advocates Ordinance 1953 (Sabah Cap. 2), ss. 8, 10*

There was a pending arbitration proceeding in Sabah relating to a dispute arising out of a joint venture agreement between certain individuals as claimants and a company as the respondent. The respondent was represented by Mr. Ho of Messrs. Ho Chong Yong who had consulted one Mr Lam of Messrs Shook Lin & Bok, Kuala Lumpur on the dispute. Mr Ho wished to retain the services of Mr. Lam to appear as co-counsel in the arbitration hearing in Sabah. It was contended that Mr Lam had undertaken extensive research on the areas of the law arising from the dispute. The claimants objected to the presence of Mr Lam as co-counsel in the arbitration proceeding on the ground that Mr Lam was not a member of the Sabah Bar and that if Mr Lam wished to appear in the proceeding he should apply for an ad hoc admission to the Sabah Bar. In view of the objection, the applicant took out this application. The following two main issues arose: (i) Whether foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) ('the Ordinance') are prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah; and (ii) Whether Mr. Lam should be granted permission to practice as counsel for the respondent in connection with the arbitration proceedings under s. 10(c) of the Ordinance.

Held (dismissing the application for ad-hoc admission):

(1) Mr Lam's works in the arbitration proceeding related to functions usually carried out by an advocate and solicitor. Mr Lam had given legal advice to Mr Ho and had appeared as

co-counsel in arbitration hearings in Singapore. The fact that Mr Lam was called a co-counsel made no difference to his task.

(2) Applying the established rule of interpreting statutes, that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute, to the words employed in s. 8 of the Ordinance, the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. If someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for ad hoc admission to the local Bar.

(3) Since Mr Lam would be doing legal works, he was required by law to be admitted to the Sabah Bar before he could appear in the arbitration proceeding. Although arbitration proceeding is a private hearing, that did not transform the legal works which Mr Lam intended to perform into non legal works. Foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited by the same from representing parties to arbitration proceedings in Sabah.

(4) In relation to whether or not an application for ad-hoc admission should be granted, the affidavit in support of the application must state the case is a complex one for which outside lawyers' expertise in the area of law is needed and the area of law comes under the following: (i) administrative and constitutional law; (ii) admiralty; (iii) elections; (iv) intellectual property; (v) patents and trademarks; (vi) professional liabilities; (vii) public law; (viii) public and private international law; or (ix) revenue law.

(5) The claims in the present arbitration proceeding, concerned construction of provisions in the JV agreement, legality of various Powers of Attorney and the enforceability of the JV agreement in the context of the Sabah Land Ordinance read with s. 24 of the Contracts Act. These claims were 'run of the mill' claims which any local qualified lawyer would be more than competent to prosecute especially as they related to the local Land Ordinance which is peculiar to Sabah only. There was no evidence why the services of Mr Lam was needed.

Case(s) referred to:

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC ***(refd)***

Zublin Muhibbah Joint Venture v. Government of Malaysia [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371 HC ***(refd)***

Re An Advocate [1964] 1 LNS 234 ***(refd)***

Legislation referred to:

Advocates Ordinance (Sabah Cap. 2), ss. 2(a), (b), 8, 9, 10(c)
Contracts Act 1950, s. 24
Federal Constitution, art. 161E(4)
Immigration Act 1959/63, s. 65(1)
Interpretation Acts 1948 and 1967, s. 17A
Legal Profession Act 1976, ss. 35(1), 36(1)

Arbitration Act 1996 [Eng], s. 36

Other source(s) referred to:

Dato' PG Lim, *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration,* [1997] 2 MLJ lxxiii, pp lxxvii-lxxviii

Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd edn, 1989, p 303

Professor Dr PS Sangal, *Alternative Dispute Resolution: A glance at the law of Malaysia and India,* [1996] 3 MLJ xxix, pp l-li

Vinayak P Pradhan, *Dispute Resolution and Arbitration in Malaysia,* [1992] 2 MLJ clxxii, p clxxiv–clxxv

For the applicant - Ho Kin Kong (Mohamed Azahari Matiasin with him); M/s Ho Chong Yong
For Sabah Law Association - Gaanesh Nandy (John Sikayun with him)
For Sabah Attorney General - Juprin Wong Adamal
For the claimants - Alex Decena (Wilson Lai with him); M/s Jayasuriya Kah & Co

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] This is an application for the following reliefs:

(a) a declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) are not prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah; or

A (b) alternatively, an order that Lam Ko Luen be granted permission to practice as counsel for Borneo Samudera Sdn Bhd in connection with the arbitration proceedings between Samsuri Baharuddin and 813 others as the claimants and Borneo Samudera Sdn Bhd as the respondent under s. 10(c)
B of the Advocates Ordinance (Sabah Cap. 2) and upon payment of the prescribed fee the Registrar be directed to issue a Certificate to Practice to the said Lam Ko Luen in respect of the aforesaid arbitration proceedings.

C **Factual Background**

[2] Presently there is a pending arbitration proceeding relating to a dispute or difference arising out of a joint venture agreement dated 9 July 1998 between certain individuals as claimants and a
D company known as the Borneo Samudera Sdn Bhd, as the respondent.

[3] The respondent is represented by Mr. Ho Kin Kong of Messrs. Ho Chong Yong who had consulted one Mr Lam Ko Luen of Messrs Shook Lin & Bok, Kuala Lumpur on the dispute.
E Mr Ho also wishes to retain his services to appear as co-counsel in the arbitration hearing on the contention that Mr Lam had undertaken extensive research on the areas of the law arising from the dispute between the respondent and the claimants and also that Mr Lam had as a matter of right entitled to appear as
F counsel in the arbitration proceeding relying on the case of *Zublin Muhibbah Joint Venture v. Government of Malaysia* [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371.

[4] The arbitration proceeding is presided by one Mr. Michael
G Hwang SC, a Chartered Arbitrator based in Singapore as the sole arbitrator, in Kota Kinabalu.

[5] Objection to the presence of Mr Lam as co-counsel in the arbitration proceeding was conveyed to the respondent by an email dated 8 August 2010 on the ground that Mr Lam is not a
H member of the Sabah Bar and if Mr Lam wishes to appear in the proceeding he should apply for an ad hoc admission to the Sabah Bar.

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[6] In view of the objection, the applicant took out this application for the reliefs set out above only on 3 September 2010 together with a certificate of urgency on the ground that there is an upcoming arbitration hearing on 20 September 2010. This matter was fixed for hearing on 15 September 2010. After hearing oral submissions from counsel I adjourn my decision to a later date despite the fact that counsel for the applicant urges the court to deliver its decision before 20 November 2010. My reasons for my course of action are simply these. First, prayer (1) of the reliefs raises issue of law which is being raised for the first time before the court of law and has ramification to the livelihood of the members of the legal profession in Sabah. Secondly, there was no valid reason given by counsel for the respondent why this application was made at the 11th hour when Mr Ho who is a past president of Sabah Law Association (SLA) and must be taken to be aware of circulars by SLA stating that any foreign practitioner who wishes to take part in arbitration hearing must seek ad-hoc admission to the Sabah Bar. Thirdly and most importantly, both the court and opposing counsel should be given a reasonable time to deliberate on such an issue of importance. In the present case, opposing counsel for the claimants and SLA had only a few days notice before this hearing, hence the court is being deprived of a prepared submission from the SLA which represents the interest of its members. Hence I invited counsel for all the parties to further submit in writing on the points raised by counsel for the applicant.

Issues

[7] Having heard submissions from counsel, this application raises two issues and they are:

1. Whether foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) are prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah?

2. Whether Lam Ko Luen should be granted permission to practice as counsel for Borneo Samudera Sdn Bhd in connection with the arbitration proceedings between Samsuri Baharuddin and 813 others as the claimants and Borneo Samudera Sdn Bhd as the respondent under s. 10(c) of the Advocates Ordinance (Sabah Cap. 2)?

A **Issue 1**

Whether Foreign Lawyers Who Are Not Advocates Within The Meaning Of The Advocates Ordinance 1953 (Sabah Cap. 2) Are Prohibited By The Same Ordinance From Representing Parties To Arbitration
B *Proceedings In Sabah?*

Applicant's Stand

[8] Counsel for applicant in advancing his case refers the court to the case of *Zublin Muhibbah Joint Venture v. Government of*
C *Malaysia (supra)* which concerns ss. 35(1) and 36(1) of the Legal Profession Act (LPA). The facts are these. The plaintiff and defendant there were parties to a contract for construction of berths at the Johor Port where there arose a dispute between the parties and an arbitrator was appointed pursuant to an arbitration
D agreement to adjudicate the dispute. The plaintiff's local counsel wanted a particular foreign counsel who had wide experience in international arbitration, to appear with him in the arbitration hearing. Objection to the presence of the foreign advocate was taken by the defendants on the ground that the foreign counsel
E was not an advocate and solicitor within the meaning of the LPA. The core issue there, as is in this case, is whether the foreign counsel is required to be an advocate and solicitor of the West Malaysia Bar before he can appear at the arbitration proceeding. The learned judge there had to consider the following provisions
F of LPA:

> **35. Right of Advocate and Solicitor.**
>
> (1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and
G plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.
>
> H **36. Advocate and solicitor to have name on the roll before practice.**
>
> (1) Subject to this section, no person shall practice as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the roll and he has a valid
I practicing certificate authorising him to do the act; a person who is not so qualified is in this Act referred to as an "unauthorised person".

37. No unauthorised person to act as advocate and solicitor. A

(1) Any unauthorised person who –

(a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts; or B C

(b) wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorised to act as an advocate and solicitor, or that he is recognised by law so qualified or authorised, D

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both. E

40. No cost payable to unauthorised person.

(1) No costs in respect of anything done by an unauthorised person as an advocate and solicitor or in respect of any act which is an offence under section 37 or 39 shall be recoverable by any person in any action, suit or matter. F

(2) Any payment to an authorised person for anything done which is an offence under section 37 or 39 may be recovered in a Court of competent jurisdiction by the person who has paid the money. G

[9] The learned judge after considering submissions from counsel there answered the issue in the negative and his rationale is as follows:

An advocate and solicitor who is a qualified person under s. 36(1) is given exclusive right by the law to appear and plead in all Courts of Justice in Malaysia. This s. 36(1) does not give exclusive right to him, nor prohibit him from appearing in other tribunals which are not Courts of Justice in this country. An unauthorised person is prohibited under pain of penalty from performing any of the acts mentioned in s. 37 of the Act. However, s. 37 of the Act is specified in the sense that those acts to be performed must be done in the Courts in Malaysia, or relating to any proceedings in any Court in Malaysia. H I

> An arbitral forum is not a court of justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Subject to s. 12 of the Arbitration Act 1952, the arbitrator is appointed by the parties to an arbitration agreement to adjudicate on certain specific facts before him, and ultimately to settle the disputes between the contracting parties arising out of their contract. The parties who may appear before the arbitrator are those provided for by the arbitration agreement, or if the agreement does not so provide, then the provisions of s. 13 of the Arbitration Act 1952 shall apply. Any person who assists a party in presenting his case may also attend, eg, a shorthand writer, an assessor, an engineer, an architect, and such parties should not be excluded without good ground when their presence are desired by a party or the award of the arbitrator may be set aside. Thus in *Haigh v. Haigh* [1861] 31 LJ Ch 420, where one of the parties desired to have his son present because the son was versed in the accounts of the business, and the arbitrator excluded the son and also a shorthand writer, the award was set aside.

[10] Counsel for the applicant in his submission also took the court through to the relevant provisions in Sabah Advocates Ordinance (the Ordinance) and the relevant provisions of the LPA and then urges the court to adopt the conclusion and rationale of Zublin case is applicable to the present case on two grounds:

First Ground

[11] The phrase "to practice in Sabah" appearing in s. 9 of the Ordinance means exclusivity of practice of advocate and solicitor in the Courts of Law of Sabah only and not in arbitration proceedings.

Submission of counsel for the applicant reads like this. This phrase is defined in s. 2 of the Ordinance as:

> (a) any of the functions which in England may be performed by a member of the Bar as such; or
>
> (b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;

[12] By that definition and on reliance of the case of *Re An Advocate* [1964] 1 LNS 234, it is contended by the applicant's counsel that what is intended by the phrase "to practice in Sabah" is to put the advocates in Sabah on the same footing as

the barristers and solicitors in England. That being the case, the next course of action is to determine whether or not barristers and solicitors have such exclusivity in England for arbitration proceeding. That exclusivity is nonexistent in England as s. 36 of the English Arbitration Act 1996 provides that:

> **36. Legal or other representation**
>
> Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

[13] And since there is no such exclusivity in England, it is submitted by the applicant's counsel that the members of the Sabah Bar have no such exclusivity.

Second Ground

[14] Counsel for applicant urges the court to take a liberal approach in its interpretation of the Ordinance. In doing so, counsel refers to the following:

1. *"The Law and Practice of Commercial Arbitration in England"*, 2nd edn, by Mustill & Boyd (1989) at p. 303:

> **2. Opportunity to attend**
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> ... The right to attend the, and indeed the right to participate in the interlocutory stages of the reference, belongs only to the parties to the reference. But the right need not be exercised in person. It may, and in the case of corporations and other artificial persons, must be exercised through agents. Representation by lawyers is usual in the more elaborate commercial arbitrations, but it is quite legitimate for a party to appoint a person who is not a lawyer to present his case. Such a person need not have any formal connection with the party he represents: he may, for example, be chosen simply because of his familiarity with the trade and its arbitration procedures.
>
> There is no absolute right to legal representation,
>
> Or at any rate not an English lawyer. It is by no means unusual for foreign lawyers to appear in English arbitrations, particularly where the dispute is not subject to English law.

2. Views by Mr. Sundra Rajoo (currently the Director of the Kuala Lumpur Regional Centre for Arbitration) entitled *"Law, Practice and Procedure of Arbitration"*, where he had pointed out that it is common practice in arbitration proceeding that parties may be represented by non-lawyers or if represented by lawyers, such lawyers may not necessarily have been admitted to the respective jurisdictions or are foreign lawyers.

3. *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration* [1997] 2 MLJ lxxiii by Dato' PG Lim (Ms) at pp lxxvii-lxxviii:

> Freedom of representation
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> A feature of arbitrating in Malaysia is the freedom of parties to choose whom they wish to represent them in arbitration proceedings. The right of foreign lawyers to appear in arbitration proceedings in Kuala Lumpur was challenged in the case of *Zublin Muhibbah Joint Venture v. Government of Malaysia*, on the ground that this would conflict with the provisions of the Legal Profession Act 1976. The High Court held (at p. 127) that s. 36(1) of that Act does not extend to arbitration proceedings because 'an arbitral forum is not a court of justice as envisaged by the Legal Profession Act 1976. It is a private tribunal'. This was another landmark decision in arbitration history in Malaysia.
>
> The right of parties to be represented by persons of their own choice is described by Prof Lowenfeld as part of the customary law of international arbitration.

4. *Alternative Dispute Resolution: A glance at the law of Malaysia and India* [1996] 3 MLJ xxix by Professor Dr PS Sangal at pp. l-li:

> The KLRCA as a Forum for International Arbitrations in this Region.
>
> It has been said that Malaysia is an ideal venue for international arbitrations, and the KLRCA is ideally placed to ensure that international disputes can be settled in accordance with the wishes of contracting parties.
>
> The Malaysian Government's continued support to making this centre as an 'international arbitral institution' is also a factor which should not be forgotten.

The following excerpt from the speech of the statesman Prime Minister of Malaysia, Datuk Seri Dr Mahathir Mohamed, puts things in clearer perspective:

> In 1979, when I opened the first conference conducted by the centre, I said I would be recommending to the government that Malaysia would be acceding to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. I also gave an assurance that the government would respect the independent functioning of the centre as an international arbitral institution and that we would be examining the relevant national legislation on arbitration to reflect this. Malaysia has indeed acceded to the Convention, and this should mean that awards handed down in arbitration proceedings held under the auspices of the centre are capable of enforcement both within and outside Malaysia in countries which have acceded to the Convention. We have also amended the Arbitration Act to remove arbitrations conducted under the Rules of the Kuala Lumpur centre from the supervision of the courts. This advantage is open to any party from the region or elsewhere who may choose to arbitrate under the Rules of the Kuala Lumpur centre.

The government of Malaysia has performed the role charted out for it by the Prime Minister very well, and the role of the courts has been supportive.

Below are two more instances of the court's support to the government's policy enacted in the form of s. 34 of the Arbitration Act 1952 and Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

First Instance: Foreign Lawyers Permitted to Appear before Arbitral Tribunals in Malaysia In Zublin Muhibbah Joint Venture v. Government of Malaysia, a significant issue arose before the High Court in Kuala Lumpur: 'Can foreign counsel appear before the arbitral tribunals in Malaysia?' The court had to decide this issue with reference to the Legal Profession Act 1976, s. 36 of which gives the advocates and solicitors of Malaysia exclusive rights to appear and plead in all courts of justice in Malaysia.

A The High Court, in construing the relevant provisions of the Legal Profession Act which are substantially similar to the equivalent provisions of the Singapore Legal Profession Act, held that the Legal Profession Act 1976 has no application to the arbitration proceedings in Malaysia as an arbitral tribunal is not a court of justice.

B

5. *Dispute Resolution and Arbitration in Malaysia* [1992] 2 MLJ clxxii by Vinayak P Pradhan at p. clxxiv–clxxv:

Another factor, which conceivably influences the international C investor to opt for arbitration, is the investor, in Malaysia, having the choice of not having to engage at all, or rely solely on, a local lawyer to represent him in the arbitration. In *Zublin Muhibbah Joint Venture v. Government of Malaysia*, the government took objection to an American attorney participating in the cross-examination of the defendant's D witnesses in the arbitration. The arbitrator (not a legally qualified man) requested the parties to sort the matter out themselves. The plaintiffs accordingly successfully applied to the High Court and obtained a declaration effectively allowing the American attorney the right to participate in the E proceedings.

Arbitrations

The law relating to arbitrations in Malaysia is the Arbitration Act 1952 which is similar to the UK 1950 Act.

F …

The right to counsel exists independently of the provisions of the Act but this may be waived. As mentioned earlier, the right of representation is not confined to local counsel G and foreign lawyers or non-legally qualified persons may represent parties to an arbitration.

[15] Counsel for the applicant in conclusion submits that it is important that this court takes into account of what have been stated by the learned authors so that 'Sabah may progress to the H next level as a preferred place for arbitration, consistent with the current trend in promoting arbitration in Malaysia'.

Findings Of The Court

I **[16]** From the outset and having read the affidavits of respective parties, I have no hesitation in finding that Mr Lam's works in the arbitration proceeding relates to functions usually carried out by an

advocate and solicitor. My reasons are these. It is undisputed that he is a legal practitioner in the West Malaysia Bar and is a partner in the firm of Shook Lin & Bok, KL. That being the case, the natural conclusion is that Mr Ho had consulted the applicant for his legal knowledge and expertise unless shown otherwise. No such rebuttal evidence is before the court. In fact the contrary evidence is before me. The applicant had affirmed that Mr Lam had given legal advice to Mr Ho and had appeared as co-counsel in arbitration hearings in Singapore. The fact that Mr Lam is called a co-counsel makes no difference to his task. Furthermore the fact that the applicant has asked for an alternative relief of ad hoc admission to the Sabah Bar shows that the applicant is not serious in contending that Mr Lam will not be practicing law in Sabah when appearing in the arbitration proceeding.

With that I now move to the issue of the right of foreign lawyers to practice in arbitration proceeding in Sabah. The starting point is s. 8 of the Ordinance which reads as follows:

> 8(1) Subject to sub-section (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation:
>
> Provided that the Attorney-General of the Federation and the State Attorney-General shall be entitled to the same rights and privileges as are enjoyed by the Attorney-General in the Courts in England:
>
> Provided further that no advocate, other than the State Attorney-General, who has the rank of Queen's Counsel shall perform any of the functions which, in England, are performed by a solicitor and are not perform by a barrister; but any advocate who has the rank of Queen's Counsel shall not be precluded by virtue of anything contained in this Ordinance from continuing or engaging in partnership with another advocate by reason only that such last mentioned advocate performs any functions as aforesaid. (emphasis added)

[17] To recap, the applicant's stand is two folds:

1. That in view of the fact that barristers and solicitors do not have exclusivity in England in arbitration proceeding, the same applies in Sabah, re s. 2(a) and (b) of the Advocates Ordinance.

2. The case of *Zublin Muhibbah Joint Venture v. Government of Malaysia (supra)* should be applied in this matter.

[18] In respect of the reliance of s. (2)(a) and (b) of the Ordinance, it is with respect without merit as the non exclusivity of barristers' and solicitors' appearance in arbitration proceeding in England is not relevant to the issue at hand which concerns the exclusivity of legal practice in Sabah. The fact that non lawyers are allowed to appear in arbitration in England in no way has any bearing on what the words 'practice in Sabah' mean.

[19] I come now to the case of *Zublin* which I have read with care and agree with counsel for SLA that it cannot be used as an authority to support the contention of the applicant. The reason for such view is easily understandable as in the LPA it refers to:

> … exclusive right to appear and plead in **all Courts of Justice in Malaysia** according to the law in force in those Courts … (emphasis added)

[20] In the Ordinance, it refers to

> … the exclusive right to **practise in Sabah** and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear … (emphasis added)

[21] It can be seen easily that the two phrases to be interpreted are completely different.

[22] Counsel for the applicant had asked the court to take into account what had been stated by various learned authors set out earlier in its deliberation. There is no doubt in my mind that ruling in favour of the applicant would enhance the policy referred by the applicant and may take Sabah to the next level as an arbitration hub. It is also note worthy that the State Attorney Chambers has expressed no objection to the applicant's application. The State Attorney by virtue of the Ordinance is head of the local Bar and his view cannot be brushed aside lightly and without reason.

[23] On the other side of the coin, I am asked by counsel for SLA to take into account of the historical background on legal practice set out in the recent Federal Court judgment of *Datuk Hj Mohammad Tufail bin Mahmud & Ors v. Dato' Ting Check Sii* [2009] 4 CLJ 449 and I have reproduced the relevant parts herein:

> Historical Background
>
> [12] To understand the position of the Advocate's Ordinance, it would be useful to know the set up of the Courts in Sabah and Sarawak before the formation of Malaysia. There were then three tiers of courts in Sabah and Sarawak, namely:
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> i. The Supreme Court of Sarawak, North Borneo and Brunei (which consisted of a High Court of Sarawak, North Borneo and Brunei and a Court of Appeal of Sarawak, North Borneo and Brunei);
>
> ii. The magistrates court; and
>
> iii. The Native Courts.
>
> This court structure was retained even after Malaysia Day except with the change of name from the "Court of Appeal" to "Federal Court". Today, these terms have different connotations. The "Federal Court" being the appellate court of last resort and the "Court of Appeal" being intermediate appellate court.
>
> [13] Rule 3 of the Sarawak, North Borneo and Brunei Court of Appeal Rules provides that the place where the Court of Appeal shall ordinarily sit depend on where the appeal or matter arises. At the same time, advocates admitted to practice under Advocates Ordinance have exclusive right to practice in Sarawak and to appear and plead in the Supreme Court and in all courts in Sarawak subordinate from the Supreme Court. They are not limited to the place of sitting of the court.
>
> [14] *Safeguards and assurances provided to Sarawak (in this case, lawyers) were critical and pivotal to secure the participation of Sarawak in the formation of Malaysia.*
>
> [15] The Cobbold Commission was created to ascertain the views of the people of the Borneo States. The report showed that the people had fears of substitution of one colonization with another; fear of being taken over by the then Federation of Malaya; fears of the submersion of the individualities of North Borneo and Sarawak within the then Federation of Malaya.

A [16] The Cobbold Commission unanimously agreed that the formation of the Federation of Malaysia is in the best interest of North Borneo and Sarawak.

[17] These fears were ultimately addressed by the formation of the Inter-Governmental Committee (IGC) on which the British, B Malaya (now properly known as Semenanjung Malaysia), North Borneo and Sarawak Governments were represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak relying on the Cobbold Commission Report. The relevant C paragraphs being paras. 3, 6 and 76 of the IGC report 1962.

[18] Following the IGC Report, the Malaysia Agreement was concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore and signed on 9 July 1963. By the D Malaysia Agreement, Malaysia came into being on 16 September 1963.

[19] Article VIII of the Malaysia Agreement provides that the Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as E maybe required to implement the assurances, undertakings and recommendations contained in, *inter alia*, Annexes A and B to the IGC Report, in so far as they are not implemented by express provision of the Constitution of Malaysia.

F [20] It was submitted that the right to practice law, can be seen in one of the safeguards contained in Annexure A to the Inter-Governmental Commission report. Para 4 of Annexure A is about Civil and Criminal Law and procedure and the administration of Justice. Paragraph 4(d) ("the 4(d) Safeguard"), which is the relevant part, reads as follows:

G

> 4(d): Persons entitled to practise before such Courts; Restrictions on the lines of the existing Borneo legislation should be continued, so that practice at the local Bar would, subject to certain exceptions provided for in that legislation, be restricted to resident advocates, until otherwise agreed H by the Borneo State Legislatures.

[21] *By the 4(d) Safeguard, it was agreed that after formation of Malaysia, the exclusive rights of the Sarawak Bar to practise in respect of all Sarawak matters (ie, all matters in or arising in Sarawak) as stated in s. 8 of Advocates Ordinance before Malaysia day would* I *continue.*

[22] Even before the formation of Malaysia, the Sarawak Bar, under the Advocates Ordinance of Sarawak, had the exclusive right to:

i. practice in Sarawak;

ii. appear and plead in the Supreme Court; and

iii. appear and plead in all subordinate Courts in Sarawak

[23] It must be noted that without such recommendations in the IGC, Cobbold Commission and the Malaysia Agreement, there may not be a Malaysia. These recommendations were not intended to and did not take away any of the Sarawak Bar's exclusive right. In fact, the rights were entrenched as a safeguard and were further extended so as to cover the right of audience before the new Federal Court.

[24] The creation of a new Federal Court was recommended in the Cobbold Commission Report and was embodied in paragraph 26(1)11 and (4)12 of the IGC Report.

[25] Now we look into the Federal Constitution ("the Constitution"). Article 74 and 77 of the Constitution are the relevant articles in this case and both articles lay down the relationship between the Federation and the States. Item 4 of List I of the Ninth Schedule to the Constitution, read with arts. 74 and 77 of the Constitution, deals with the matter of administration of justice, jurisdiction of courts and the right to practice before the courts. Item 4 reads:

> 4. Civil and criminal law and procedure and the administration of justice, including:
>
> (a) Constitution and organization of all courts other than Syariah Courts;
>
> (b) Jurisdiction and powers of all such courts;
>
> (c) Remuneration and other privileges of the judges and officers presiding over such courts;
>
> (d) Persons entitled to practice before such courts;

[26] It was submitted that the Federal Court, which was established upon formation of Malaysia, is to be included in the interpretation of "all courts other than Syariah Courts". Having that interpretation on one hand, and the 4(d) Safeguard on the other hand, the Sarawak Bar would seem to continue to have the

A exclusiveness as encapsulated in s. 8 of the Advocates Ordinance of Sarawak, which was enacted in 1953 and also when Malaysia was formed. Such interpretation will be consistent with paragraph 26(3) of the IGC Report which provides for a new Federal Court as the appellate court for the three different jurisdictions. This is
B supported by paragraph 26(4) of the same report which distinguishes "a case arising from a Borneo State" from others and hearing it outside Sarawak.

[27] Though it may not be the norm, that a Sarawak matter be heard outside Sarawak, it could not have been intended, by the
C Legislature that when an appeal case arising in Sarawak is heard outside Sarawak, a member of the Sarawak Bar would suddenly lose that right of audience.

[24] Apart from the historical background, I am also asked to look at this application from the wider perspective and that is
D whether if this application is allowed it would open the doors of the State for employment to foreigners. Counsel then refers to para. 148(g) of the Cobbold Commission's Report which states as follows:

E It has been widely represented to the Commission by all races and communities in North Borneo and Sarawak that the small population of the two territories in relation to their size makes it essential to provide them with protection against unrestricted movement of people from other parts of the Federation. We have
F no doubt that this is a legitimate and essential requirement ...

[25] That paragraph summarizes the position of parties like Malaysia Solidarity Consultative Committee which in its Memorandum on Malaysia to the Commission at para. 24 noted as follows:

G

... it is a matter of great apprehension to the delegations from the Borneo territories that there might be free movements from Singapore and the peninsular into the Borneo territories ... The Borneo territories are anxious to protect their lands, trade and employment from being taken up by people from the other parts
H of Malaysia.

[26] As we all know, the Commission's recommendation is embodied in art. 161E (4) of the Federal Constitution where in effect gave the power of control of movements of non residents
I into Sabah and Sarawak to the respective State Government through s. 65(1) of the Immigration Act.

[27] Both counsel in fact are asking the court to take into account policy matters in its deliberation. The two policies in short can be said to be these:

1. For the applicant – adopt the noble ideal of making the State of Sabah a place of welcome for arbitration proceeding.

2. For the SLA – to protect the State of Sabah from an influx of foreigners taking up employment.

[28] It has been said that the courts should not rely on policy matters to come to their decisions as 'policy matters are like unruly horses which will take you to different destinations on different occasions'. In another word, there will be no certainty of the law by the courts which is manned by judges who invariably have different views as what the appropriate policy should be.

There is much merit in that saying.

[29] Reverting to the issue at hand, I must follow the established rule of interpreting statutes and that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute. Applying that trite principle to words employed in s. 8 of the Ordinance, I have no hesitation in holding and do hold that the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. In short, if someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for ad hoc admission to the local Bar. In the case before me, Mr Lam wants to appear in an arbitration proceeding and as stated by me earlier he would be doing legal works. As such he would be required by law to be admitted to the Sabah Bar before he can appear in that proceeding. It may be that the arbitration proceeding is a private hearing but that does not transform the legal works which Mr Lam intends to perform into non legal works. My view is premised on the phrase "legal practice in Sabah". If the legislature had wanted the exclusivity of lawyers in Sabah to be in the courts only, then that can be achieved easily by a stroke of the pen by adopting the words used in the LPA which would read as 'exclusive right to appear and plead in all Courts of Justice in Sabah and Sarawak '. The court cannot legislate, its duty is only to interpret what the legislators have legislated and apply the law.

[30] Even if I am wrong in my approach in construing s. 8 of the Ordinance, I would have come to the same view if I were to refer to the policy matters in my deliberation. Firstly I should decide which policy consideration I should rely on. The policy put forth by the applicant with respect cannot be relied on as it is a policy which has no legal or historical basis unlike that of put forth by counsel for SLA. In a borderless world, I have no doubt that that policy is good and sound. But the reality is that in Sabah and Sarawak we have borders which I cannot ignore until they are removed. These borders are entrenched in our Constitution. In fact the Federal Court in *Datuk Haji Mohammed Tufail bin Mahmod and Sanyan Holdings Sdn Bhd v. Dato' Ting Check Sii (supra)* had alluded to the historical background to these borders in construing a section in the Advocates Ordinance of Sarawak which has the same provisions as the Sabah Advocates Ordinance. I am fully aware of the fact that the issue in the Federal Court case relates to a different issue to that of here. Be that as it may, what is of utmost important in the judgment of the learned Chief Justice is the recognition by the Highest Court in the land that what had been agreed by our forefathers continues to have relevance today despite a lapse of 47 years after the formation of Malaysia. In so far as legal practitioners in Sarawak and Sabah are concerned, the Federal Court held that they maintain exclusivity of audience in the whole of Malaysia for cases emanating from Sarawak or Sabah. What that tells me is this. The protection of legal practitioners is a matter which our forefathers in the early 1960s had discussed and agreed in the negotiation for the formation of Malaysia. The learned Chief Justice had put the importance of those safeguards and assurances in the following manner:

> [14] Safeguards and assurances provided to Sarawak (in this case, lawyers) were critical and pivotal to secure the participation of Sarawak in the formation of Malaysia.

[31] The significant words in that paragraph are 'critical and pivotal to secure'. With such strong words, it would be unwise for me to ignore them in my task of deliberation unless cogent reasons are given to me. There is of course no such reason before me. There is no doubt in my mind that the rationale and spirit behind this exclusivity is to give the Sabah government the sole control of employment of non residents in Sabah. And if I were to concede to the position put forth by the applicant, I also have no

doubt that that rationale and spirit would be destroyed and foreign lawyers would be able to set up their offices in Sabah and Sarawak to solely engage in legal works for arbitration proceedings. That in my view cannot be what the forefathers had in mind when the Advocates Ordinance was enacted. Also of significance is s. 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[32] For reasons stated above and applying established principles of construction, I hold that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited by the same from representing parties to arbitration proceedings in Sabah.

Issue 2

Whether Lam Ko Luen Should Be Granted Permission To Practice As Counsel For Borneo Samudera Sdn Bhd In Connection With The Arbitration Proceedings Between Samsuri Baharuddin And 813 Others As The Claimants And Borneo Samudera Sdn Bhd As The Respondent Under s. 10(c) Of The Advocates Ordinance (Sabah Cap. 2)?

[33] Whether or not an application for ad hoc admission should be granted is guided by the three circulars issued by the SLA in consultation with the State Attorney-General. From those guidelines, it can be said the affidavit in support of the application must state the case is a complex one for which outside lawyers' expertise in the areas of law is needed and the area of law comes under the following:

(i) administrative and constitutional law;

(ii) admiralty;

(iii) elections;

(iv) intellectual property;

(v) patents and trademarks;

A (vi) professional liabilities;

(vii) public law;

(viii) public and private international law; and

B (ix) revenue law.

[34] Counsel for SLA had referred me to two decisions and in my view it is appropriate that I should set them out in my judgment.

C **[35]** In Petition No K-17-04-2002 (Joan Goh Penn Nee, applicant), the court made the following observations:

> Pausing here, it is based that the certain guideline be laid down as to when it can be accepted that a litigant cannot get an advocate in Sabah. In this aspect, the Court expects a litigant to
> D enlist the assistance of the Sabah Law Association, and for the Sabah Law Association to help, to obtain the service of a Sabah advocate and that is only upon the failure of the Sabah Law Association to do so that this Court can accept any assertion of allegation of a litigant that it cannot enlist the services of a Sabah
> E advocate. Such is absent in the present case and I am not satisfied that no Sabah lawyer is prepared to act for Wong.

[36] These observations were affirmed by the Court of Appeal in Civil Appeal No S-02-513-2002.

F **[37]** In Originating Motion No K-17-15-2004 (Datuk Chow Chin Thong @ Chau Chin Tang, applicant), the court made the following remarks even though the application for ad hoc admission was withdrawn:

> G Application struck-off but just some remarks for future reference. It is because local expertise is not available that lawyers from out of Sabah are sought to be admitted ad-hoc. Therefore, in future when there is such application, there must be an affidavit to state whether there is such local expertise or not and why not together
> H the details of the expertise of the lawyer sought to be admitted. This has been the practise and it should apply to both civil and criminal cases.

[38] The above set out a simple test and that is:

> I Does the dispute raise complex issues of law and fact in the arbitration proceeding and if so, whether there is a lack of local expertise in Sabah necessitating the need to obtain the services of lawyers from out of Sabah?

[39] The claims in the arbitration proceeding, as gathered from the affidavits filed, concern construction of provisions in the JV agreement, legality of various Powers of Attorney and the enforceability of the JV agreement in the context of the Sabah Land Ordinance read with s. 24 of the Contracts Act. These claims in my view are 'run of the mill' claims which any local qualified lawyer would be more than competent to prosecute especially as it relates to the local Land Ordinance which is peculiar to Sabah only. There is no evidence before me why the services of Mr Lam is needed. Accordingly I am left with no option but to dismiss the application for ad hoc admission by Mr Lam.

[40] Finally as this matter is of public interest, I make no order as to costs.